Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-466

KENNETH SHALOM MILLROOD,

*Petitioner,*

vs.

SUPT. LOWELL D. HEWITT and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

---

UNITED STATES OF AMERICA ex rel: JAMES KIRCHNER,

*Petitioner,*

vs.

W. G. JOHNSTONE, JR., PRESIDENT JUDGE, COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA; D. RICHARD ECKMAN, DISTRICT ATTORNEY OF LANCASTER COUNTY, PENNSYLVANIA

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## Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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## REASONS FOR DENYING WRIT

The petitioners in this case were jointly tried, convicted, and sentenced for a violation of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. 780-101 *et seq*. The applicable section is in 35 P.S. 780-113, as follows:

> (a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:
>
> (30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, as knowingly creating, delivering or possession with intent to deliver, a counterfeit controlled substance.

The Pennsylvania act, like the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 841, contains the following clause at 35 P.S. 780-121.

> "In any prosecution under this act, it shall not be necessary to negate any of the exemptions or exceptions of this act in any complaint, information, or trial. The burden of proof of such exemption or exceptions shall be on the person claiming it."

The federal act at 21 U.S.C. 885(a)(1) states that:

> "it shall not be necessary for the United States to negative any exemption or exception set forth in this subchapter . . . in any trial, hearing or other proceeding under this subchapter, and the burden of going forward with the evidence with respect to any such exemption shall be on the person claiming its benefit."

At the time of the petitioner's trial the governing law was that of *Commonwealth v. Stawinsky*, 234 Pa. Super. 308, 339 A.2d 91 (1975) which held that it was the burden of the defendant to prove his authorization by a preponderance of the evidence. Subsequently, however the Superior Court of Pennsylvania modified its decision in *Stawinsky* and held that non-authorization (lack of authority, license, and registration) is an element of the crime, and the Commonwealth would have the burden of proving it beyond a reasonable doubt, however, although the Commonwealth has the burden of persuasion, it does not have the burden of production. The Court stated that a defendant must come forward with some evidence of authorization before the Commonwealth need disprove authorization beyond a reasonable doubt. *Commonwealth v. Sojourner*, — Pa. Super. —, — A.2d — (No. 2387 October Term, 1976, filed June 22, 1979, opinion by President Judge Cercone).

This decision is in accordance with the interpretation given to the Comprehensive Drug Abuse and Control Act of 1970. *United States v. Rosenberg*, 515 F.2d 190, (Ninth Cir., 1975), *United States v. Collier*, 478 F.2d 268 (Fifth Cir., 1973), *United States v. Kelly*, 500 F.2d 72 (Seventh Cir., 1974). In *Collier, supra*, the Court stated:

> In considering the issue of burden of proof, one must distinguish between the burden of persuasion and the burden of going forward with the evidence. Of course, the burden of persuading the jury beyond a reasonable doubt that the defendant committed every essential element of the offense charged remains upon the prosecution throughout the trial. This precise constitutional attack on the predecessor to the present act was rejected by this Circuit in United States v. Ramzy, 446 F.2d 1184 (5 Cir. 1971). See also United States v. Rowlette, 397 F.2d 475 (7 Cir. 1968).



Pennsylvania law is thus in accord with federal law in this particular area. Both agree that the burden of going forward may be on the defendant, but both also agree that ultimately the prosecution would have the burden of proof, and such proof would be proof beyond a reasonable doubt. In fact, this Court in *Patterson v. New York*, 432 U.S. 197, 53 L.Ed.2d 281, 97 S.Ct. 2318 (1977), specifically approved the procedure adopted by the Superior Court of Pennsylvania in *Sojourner*, and a reading of *Sojourner* indicates that *Patterson* played a strong role in influencing the Superior Court to decide *Sojourner* as it did.

The procedural history of this case indicates that this precise question, involving one of these petitioners, was before this Court, *Millrood v. Pennsylvania*, 434 U.S. 826, 54 L.Ed.2d 84, 98 S. Ct. 75 (1977), however, at that time the petitioner Millrood was requesting the writ of certiorari be directed to the Supreme Court of Pennsylvania. The petition was denied on October 3, 1977. The only difference with this petition and the former one is that Millrood is joined in this by his co-defendant Kirchner, and the petition requests that the writ issue to review the judgment of the United States Court of Appeals for the Third Circuit.

The primary cases relied on for granting the writ are *In Re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, 90 S. Ct. 1068 (1970), *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed.2d 508, 95 S. Ct. 1881 (1975), *Patterson v. New York, supra*, and *Sandstrom v. Montana*, — U.S. —, 61 L.Ed.2d 39, 99 S. Ct. 2450 (1979). Of these cases all but *Sandstrom* had been decided prior to the denial of the petition for a writ in *Millrood v. Pennsylvania, supra*. The addition of *Sandstrom* to the first three (3) cases does nothing to aid the petitioners' arguments. The decision of the Pennsylvania courts, and the United States Court of Appeals for the Third Circuit, in this case, are harmonious with the decisions in *Winship, Mullaney, Patterson*, and *Sandstrom*.

## CONCLUSION

Because this petition deals with an area of law in which both the Courts of the United States and the Commonwealth of Pennsylvania are in agreement on, and which no decision is further required, the request for a writ of certiorari should be denied.

Respectfully submitted,

OFFICE OF THE DISTRICT ATTORNEY

By: /s/ Joseph C. Madenspacher
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